SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 24

VICTOR J. HERB, PETITIONER,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS FOR WABASH RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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[fol. a] [Caption omitted]

[fol. 1]

IN THE SUPREME COURT OF ILLINOIS, MAY TERM, A. D. 1943

VICTOR J. HERB, Plaintiff-Appellant,

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Company, a Corporation, Defendants-Appellees

Appeal from the Circuit Court of Madison County, State of Illinois

Hon. D. H. Mudge, Trial Judge

Abstract of Record—Filed April 20, 1943

Placita and convening order of the Circuit Court of Madison County, Illinois, May 25, 1942.

Transcript of Proceedings in the City Court of Granite City, Illinois

(Filed in the Circuit Court of Madison County, Illinois, July 31, 1942)

STATE OF ILLINOIS,
Madison County,
City of Granite City, ss:

At a regular term of the City Court of Granite City, County of Madison and State of Illinois, begun and held [fol. 2] at the city court rooms, in and for said city, in said County of Madison, on Monday, the 1st day of June, A. D. 1942, it being the first Monday of June, A. D. 1942, in pursuance of law, by the Hon. Wesley Lueders, Judge of said court, the following proceedings were had, to wit:

Present: Honorable Wesley Lueders, Judge. W. R. Wittman, Sheriff. William C. Burton, State's Attorney. Alvah N. Homan, Clerk.

VICTOR J. HERB, Plaintiff,

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for the Wabash Railway Company, a Corporation, Defendants

Civil Action at Law, No. 4053

ORDER DENYING MOTION TO DISMISS

Feb. 16, 1938: Motion to dismiss presented and argued, Motion denied—Defendants except—Rule on defendants to answer on or before February 28th, 1938.

ORDER TO SHOW CAUSE

February 26th, 1938: Order to show cause as per written form on file. (See Order)

ORDER TO PRODUCE CERTAIN DOCUMENTS

March 19, 1938: It is ordered that the defendants produce certain documents, all as per written order on file. (See Order)

MINUTE ENTRIES OF TRIAL

Oct. 13, 1938: Plaintiff is given leave to file reply to defendants' answer same filed instanter. Case called for trial, both sides announce ready Jury chosen, elected and [fol. 3] duly sworn to try the issues; Attorneys make opening statements for their respective sides. Trial proceeds with evidence on behalf of the plaintiff; with evidence still in progress on behalf of plaintiff Court adjourns until 9 a. m. Friday October 14, 1938.

Oct. 14, 1938: 9 a. m. Court convened and trial of case resumed with evidence on behalf of the plaintiff; Plaintiff rests. And defendants tender motion for instructed verdict, and judgment thereon is reserved. Trial proceeds with evidence on behalf of the defendants; Defendants rest. Plaintiff offers no evidence in rebuttal. Case closed as to evidence. Defendants renew motion for instructed verdict

in its behalf. Judgment reserved thereon as before. Court confers with Attorneys on Instructions. Attorneys argue to jury, Their respective sides of the case. The Court instructs the jury as to the law and the forms of verdict. Jury retire in charge of a sworn officer to consider of their verdict. Sealed verdict agreed upon and polling of the jury is expressly waived.

VERDICT

Oct. 15, 1938: Verdict of the Jury: "We, the jury, find the issues in favor of the plaintiff and fix the amount of his recovery at $30,000.00."

Nov. 17, 1938: Plaintiff's exhibits F & G removed by defendant's attorney Wesley Lueders.

Nov. 30, 1938: Motion heretofore submitted by Defendants for instructed verdict in its favor are taken up and argued at length by counsel for the respective parties. The Court now takes said matter under advisement pending submission and examination of authorities.

[fol. 4] ORDER GRANTING DEFENDANTS' MOTION FOR DIRECTED VERDICT; JUDGMENT

October 13, 1939: The Court having considered at length the briefs of legal authorities submitted by counsel; and the cases dealing with subject matter of this suit; and being now well and sufficiently advised in the premises, grants the motion of defendants for a directed verdict herein, in their favor as heretofore tendered, and taken under advisement by the court; and in as much as the jury in the trial if this case has in the meantime, returned a verdict in favor of the plaintiff, in the sum of $30,000.00; The Court doth now render judgment Non obstante Veredicto in favor of the defendants and against the plaintiff in bar of further action, and for costs to which action and ruling of the Court, Plaintiff excepted, excepts and continues to except. Written opinion of presiding Judge Wm. P. Boynton filed.

NOTICE OF APPEAL

October 25, 1939: Notice of appeal on the part of Plaintiff filed.

October 28, 1939: Acknowledgment of receipt of copy of Notice of Appeal filed and affidavit of service of Notice of Appeal on Attorneys for defendants, filed.

ORDER FIXING AMOUNT OF BOND

Petition for order fixing amount of Appeal bond filed, Praecipe for record filed Upon petition of Plaintiff in the matter of Appeal from the order of the Court herein, Oct. 13, 1939, the Court now fixes the amount of the appeal bond to be given by plaintiff for appeal to the Appellate Court of the Fourth District of Illinois, at the sum of Five Hundred ($500.00) Dollars, with surety to be approved by the Clerk of this Court.

Nov. 1, 1939: Affidavit of service of Praecipe for record upon Defendants' Attorneys filed.

[fol. 5] November 9, 1939: Appeal bond filed and approved by the Clerk of this Court leave given George D. Burroughs attorney for defendants to withdraw plaintiff's exhibits "A", "C", "D" and "E".

ORDER REDOCKETING CAUSE, ETC.

Nov. 25, 1941: Motion of Plaintiff to re-docket this cause pursuant to the provisions of the Statute, upon mandate of Appellate Court for the Fourth District of Illinois; Its transcript and order reversing the judgment of this Court in said suit, is presented and allowed, and said cause is hereby redocketed as per order this day approved and directed to be filed and enrolled. Defendants file their motion to dismiss this suit, on the ground the Court is without jurisdiction of the subject matter, same is submitted by attorneys on briefs without argument, and is by the Court taken under advisement; This day Attorneys for plaintiff file their written motion for judgment in favor of the plaintiff upon the verdict of the jury herein, the Court reserves consideration thereof for future action.

MINUTE ENTRY OF ARGUMENTS

June 30, 1942: Plaintiff's motion for judgment upon the verdict, filed herein November 25th 1941, is by the plaintiff withdrawn; Court hears arguments for and against the granting of Plaintiff's motion for change of venue from the City Court of Granite City to the Circuit Court of Madison County, Illinois, and takes same under advisement in connection with motion by Defendants to dismiss suit, pending the submission of briefs and consideration of legal principles involved.

ORDER GRANTING MOTION FOR CHANGE OF VENUE, ETC.

July 17th 1942: The Court having considered of the legal authorities submitted by the attorneys for and against the granting of the motion of Plaintiff for a change of venue in this cause, from this court; to the Circuit Court of Madi-
[fol. 6] son County, Illinois; and being now well and sufficiently advised in the premises, doth grant said motion, and change the venue of said cause to said Circuit Court of Madison County, Illinois; and plaintiff is hereby assessed with all costs in this suit up to and including the costs of this change of venue, save and except such costs as shall have been occasioned by the Defendants answer to the Complaint, the trial thereof, and the costs of the appeal herein; the Clerk is hereby instructed to transmit all and singular a transcript of the record and proceedings in this case in this court, together with all orders, papers, pleadings and files, to the Clerk of said Circuit Court of Madison County, Illinois, without delay. The Motion by defendants to dismiss this action is denied.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 7] Cost bill in the City Court of Granite City, Illinois.

Record entry of the filing, on July 31, 1942, in the Circuit Court of Madison County, Illinois, on change of venue from the City Court of Granite City, Illinois, of the various pleadings, papers and exhibits in this cause.

Placita and convening order of the City Court of Granite City, Illinois, December 13, 1937.

COMPLAINT

(Filed in the City Court of Granite City, Illinois, December 22, 1937.)

Victor J. Herb, plaintiff, by McGlynn & McGlynn and Mark D. Eagleton, his attorneys, complaining of Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for the Wabash Railway Company, a corporation, defendants, alleges:

1. That the defendants were at all times herein mentioned, and are now, the duly appointed, qualified and acting receivers for the Wabash Railway Company, a cor-

poration, under and by virtue of their appointment as such by duly made and entered order or orders of the United [fol. 8] States District Court for the Southern District of Illinois.

2. That at all times herein mentioned defendants, as such receivers, were, and are now, in charge of and operating all of the herein referred to railroad properties, steam railroad system and lines, locomotives, cars, tracks and equipment of the said Wabash Railway Company, operating the same as common carriers of freight and passengers for hire to and from the State of Illinois, and to and from other states of the United States of America, and engaged in interstate commerce by railroad.

3. That on the 23rd day of November, 1936, plaintiff was, and for some time prior thereto had been, a servant in the employ of the defendants as a switchman, working as such employee and servant of defendants in, upon and about defendants' cars, trains and locomotives used and hauled by defendants as such common carrier by railroad.

4. That as such switchman, servant and employee of defendants, as aforesaid, plaintiff's earnings and wages were approximately two hundred dollars ($200.00) per month.

5. That on said date aforesaid, at the time of his injury hereinafter alleged, plaintiff was working as such employee, servant and switchman of defendants in, upon and about a train which contained cars then and there being moved and transported by defendants in interstate commerce, and which contained shipments originating in Illinois and destined to points outside of the State of Illinois.

[fol. 9] 6. That by reason of the facts hereinbefore alleged, plaintiff and defendants became, and were at all times herein mentioned, engaged in interstate commerce and transportation, and subject to the provisions of certain acts of Congress of the United States relating to the liability of railroads for injury to and death of their employees, which statutes are commonly known as the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59).

7. That at the time of the hereinafter mentioned injury to plaintiff, he was working as such switchman for the defendants and as a member of one of defendants' switching

crews in, upon and about a train of cars which was being moved and hauled by one of defendants' locomotives in the yards of the A. E. Staley Manufacturing Company at or near the City of Decatur, County of Macon, State of Illinois.

8. That under and by virtue of the terms and provisions of certain acts of Congress of the United States of America, commonly known as the Federal Safety Appliance Act (45 U. S. C. A., Sections 1-16), and under and by virtue of the terms and provisions of the orders, rules and regulations of the Interstate Commerce Commission of the United States made, entered and promulgated pursuant to said Federal Safety Appliance Act (45 U. S. C. A., Section 12), it became and was the duty of defendants not to haul or use any car not equipped with an efficient hand brake.

9. That defendants disregarded their duty in that behalf and then and there had in use and hauled, upon the tracks in said yard, a boxcar which was not then and there [fol. 10] equipped with an efficient hand brake as prescribed by the aforesaid Federal Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission made pursuant thereto.

10. That, while plaintiff and defendants were thus engaged in interstate commerce and transportation as aforesaid, and while plaintiff, in the usual course of his employment as aforesaid, was upon said boxcar, which was not equipped with an efficient hand brake as aforesaid, and while said car was being used and hauled by defendants as aforesaid, plaintiff did place his hand upon the wheel of said hand brake and said hand brake did improperly release and operate so that the wheel thereof did suddenly, violently and unexpectedly spin and turn, causing plaintiff to be thrown from said boxcar to the ground and tracks there and to be run over by the cars of said train and to sustain the injuries hereinafter more particularly alleged, all of which was caused by the inefficiency of said hand brake and as a direct and proximate result of defendants' aforesaid violation of their duty under said Federal Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission made and promulgated pursuant thereto, as hereinbefore alleged.

11. Plaintiff further states that, as a direct and proximate result of defendants' aforesaid failure to comply with the aforesaid laws of the United States of America, and with the aforesaid rules, orders and regulations of the Interstate Commerce Commission, plaintiff's head, face, neck, [fol. 11] back and spine, chest, abdomen, and internal organs, arms and legs, and the bones, joints, muscles, tendons, tissues, nerves, membranes, ligaments, vessels and skin thereof were seriously bruised, contused, lacerated, sprained, strained, wrenched, swollen, inflamed, infected, scarred, disfigured, dislocated, displaced, fractured and amputated; that plaintiff's left leg was run over, mangled and a part of the leg and foot amputated by the wheels of the said train; that plaintiff was required to undergo operations for the reamputation of said left leg; that plaintiff sustained a severe shock, and his nerves and nervous system were severely shocked; that plaintiff suffered, suffers and will in the future continue to suffer severe pain of body and anguish of mind, and from headaches, nervousness, weakness and insomnia; that plaintiff has been disabled from performing his usual work and duties as a switchman, and will in the future continue to be so disabled; that plaintiff has lost wages and earnings at the rate of approximately two hundred dollars ($200.00) per month, from said 23rd day of November, 1936, to the time of the filing of this complaint, and will in the future continue to lose all or the greater portion thereof; that plaintiff's ability to walk and to move about has been seriously and permanently impaired and diminished; that plaintiff's ability to work and to earn a livelihood has been seriously and permanently impaired, lessened and diminished; that all of said injuries and effects are serious and permanent, and the function and use of all the aforesaid parts and organs have been seriously and permanently impaired, diminished and rendered painful; all to the plaintiff's injury and damage in the sum of sixty thousand dollars ($60,000.00).

[fol. 12] Wherefore, plaintiff demands judgment against defendants for the sum of sixty thousand dollars ($60,000.00).

Mark D. Eagleton, 1020 Telephone Building, St. Louis, Missouri, McGlynn & McGlynn, 120 North Main Street, East St. Louis, Illinois, Attorneys for Plaintiff.

Plaintiff demands a jury trial in this case.

Plaintiff requests the Court to issue summons for the defendants in the above cause.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff.

Request for summons.

Demand for jury trial.

Summons with Sheriff's return.

Answer of Defendants

(Filed in the City Court of Granite City, Illinois, February 28, 1938.)

Now come Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for Wabash Railway Company, duly appointed, qualified and acting as such by an order and decree of the District Court of the United States for the Southern District of Illinois, and appearing only as such [fol. 13] Receivers, and for answer as such Receivers to the complaint, say:

1. That these defendants were at all times mentioned in the complaint, and are now, the duly appointed, qualified and acting Receivers for the Wabash Railway Company, a corporation, under and by virtue of an order and decree of the District Court of the United States for the Southern District of Illinois.

2. That, as such Receivers, at the times mentioned in the complaint, they were, and are now, in charge of and operating the railroad properties, locomotives, cars, tracks and equipment of said Wabash Railway Company located within the Southern District of Illinois, as common carriers of freight and passengers for hire between stations and points in said Southern District of Illinois and other states of the United States, and engaged in interstate commerce by railroad; but they deny that, as such Receivers, they were at all times mentioned in the complaint, and now are, in charge of and operating all of the railroad properties, steam railroad system and lines, locomotives, cars, tracks and equipment of said Wabash Railway Company, as alleged in paragraph 2 of said complaint.

3. That on the 23rd day of November, 1936, plaintiff was, and for some time prior thereto had been, a servant

in the employ of the defendants; but they deny that on said day he was employed as a switchman working upon and about defendants' cars, trains and locomotives used and hauled by defendants as such common carrier by railroad.

4. They deny that, as such servant and employee, plaintiff's earnings and wages were approximately two hundred dollars ($200.00) per month.

[fol. 14] 5. They deny that on said last-mentioned date, at the time of plaintiff's alleged injury, he was working as such employee, servant and switchman of defendants in, upon and about a train which contained cars then and there moved and transported by defendants in interstate commerce, and which contained shipments originating in Illinois and destined to points outside of the State of Illinois.

6. They deny that, by reason of the facts alleged in the complaint, plaintiff and defendants became and were at all times therein mentioned engaged in interstate commerce and transportation, and subject to the provisions of certain Acts of Congress of the United States relating to the liability of railroads for injury to and death of their employees, which statutes are commonly known as the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59).

7. They deny that at the time of plaintiff's alleged injury he was working as such switchman for the defendants and as a member of one of defendants' switching crews in, upon and about a train of cars which plaintiff alleges was being moved and hauled by one of defendants' locomotives in the yards of the A. E. Staley Manufacturing Company at or near the City of Decatur, County of Macon, State of Illinois.

8. They deny that under and by virtue of the terms and provisions of certain acts of Congress of the United States of America, commonly known as the Federal Safety Appliance Act (45 U. S. C. A., Sections 1-16), and under and by virtue of the terms and provisions of the orders, rules and regulations of the Interstate Commerce Commission of the [fol. 15] United States made, entered and promulgated pursuant to said Federal Safety Appliance Act (45 U. S. C. A., Section 12), it become and was the duty of defendants not to haul or use any car not equipped with an efficient hand brake.

9. Defendants deny that they disregarded their alleged duty, and deny that they then and there had in use and hauled upon the tracks in said yards a boxcar which was not then and there equipped with an efficient hand brake, as prescribed by the Federal Safety Appliance Act and the orders, rules and regulations of the Interstate Commerce Commission made pursuant thereto.

10. Defendants deny each and every averment in paragraph 10 of the complaint, and deny that plaintiff and defendants were engaged in interstate commerce and transportation, and deny that while plaintiff was in the usual course of his employment he was upon a boxcar which was not equipped with an efficient hand brake, and deny that while said alleged car was being used and hauled by defendants that plaintiff placed his hand upon the wheel of said hand brake, and deny that said hand brake did improperly release and operate so that the wheel thereof did suddenly, violently and unexpectedly spin and turn, causing the plaintiff to be thrown from said boxcar to the ground and tracks there and to be run over by the cars of said train and to sustain the injuries alleged to have been sustained by him, as set forth in said complaint; and they deny that any alleged injuries received by plaintiff were caused by the inefficiency of said hand brake or as a direct and proximate result of defendants' violation of their duty under said Federal Safety Appliance Act [fol. 16] and the orders, rules and regulations of the Interstate Commerce Commission made and promulgated pursuant thereof.

11. Defendants deny that as a direct and proximate result of defendants' alleged failure to comply with the laws of the United States of America, and with the rules, orders and regulations of the Interstate Commerce Commission, as alleged in the complaint, the plaintiff's head, face, neck, back and spine, chest, abdomen, and internal organs, arms and legs, and the bones, joints, muscles, tendons, tissues, nerves, membranes, ligaments, and other parts of plaintiff's body were seriously bruised, contused, lacerated, sprained, strained, wrenched, swollen, inflamed, infected, scarred, disfigured, dislocated, displaced, fractured, amputated, and otherwise injured; and deny that plaintiff's left leg was run over, mangled, and a part of the leg and foot amputated by the wheels of defendants' train, or

that plaintiff was required to undergo operations for the reamputation of said left leg, or that plaintiff sustained a severe shock; and they deny that plaintiff suffered and will in the future continue to suffer severe pain of body and anguish of mind, and from headaches, nervousness, weakness and insomnia, or that plaintiff has been disabled from performing his usual work and duties as a switchman, and deny that he will in the future continue to be disabled, or that plaintiff has lost wages and earnings at the rate of approximately two hundred dollars ($200.00) per month from the said 23rd day of November, 1936, to the time of the filing of his complaint, or that he will in the future continue to lose all or the greater portion of said amount; and they deny that plaintiff's [fol. 17] ability to work and to earn a livelihood has been seriously and permanently impaired, lessened and diminished, or that his alleged injuries and effects are serious and permanent; and deny that plaintiff has been permanently disabled and impaired, as alleged in said complaint.

12. Defendants, as such Receivers, for further answer to the complaint, and by way of affirmative relief, state that if the said Victor J. Herb received the injuries alleged in the complaint, that such injuries did not result from any violation by defendants of the Federal Safety Appliance Act, or the orders, rules and regulations of the Interstate Commerce Commission of the United States, as alleged in the complaint, but were the direct result of and caused by risks assumed by the said Victor J. Herb in the performance of the work in which he was then engaged and which was then being performed by him; that he was an experienced switchman and employee in railroad work, and that the risk and danger of injury while performing said work were open and obvious to a person of ordinary prudence, and that said Victor J. Herb was acquainted with and aware of such danger and risk, or ought to have been informed and aware of such danger and risk in performing the work in which he was then and there employed; that such risk and danger were incidents to his employment, and that by reason thereof the said Victor J. Herb assumed the risk and danger of such employment, and that he is, therefore, not entitled to recover.

13. Defendants, as such Receivers, for further answer and defense to the complaint, state that if said Victor J.

Herb was thrown from a train or from a boxcar at the time and place alleged in the complaint and was injured, [fol. 18] as alleged therein, that said injuries were directly caused by the carelessness and negligence of the said Victor J. Herb in the manner in which he performed his said duties and the manner in which he moved upon, along and over said train or said boxcar and in failing to anticipate and guard against the movements and motion of the said train and said boxcar, and in failing to so move over, upon and along said train or said boxcar as to avoid becoming unbalanced and falling or being thrown from said train or said boxcar, when, by the exercise of reasonable and ordinary care on his part, he could have avoided falling or being thrown therefrom, and that said negligence and carelessness on the part of said Victor J. Herb directly caused or contributed to his alleged injuries.

14. Defendants deny that plaintiff is entitled to a judgment against them, or either of them, for the sum of sixty thousand dollars ($60,000.00), or any part thereof.

Wherefore, having fully answered the complaint, these defendants, as such Receivers, ask to be discharged with their costs.

Wesley Lueders, Granite City, Illinois; Warnock, Williamson & Burroughs, Bank of Edwardsville Building, Edwardsville, Illinois, Attorneys for Defendants.

Plaintiff's reply filed in the City Court of Granite City, Illinois, March 5, 1938.

[fol. 19] Verdict of the jury, in favor of the plaintiff in the sum of $30,000.00, filed in the City Court of Granite City, Illinois, October 15, 1938.

Plaintiff's notice of appeal, filed in the City Court of Granite City, Illinois, October 25, 1939.

Affidavit of service of plaintiff's notice of appeal.

Praecipe for record, filed in the City Court of Granite City, Illinois, October 28, 1939.

Affidavit of service of praecipe for record.

MANDATE OF APPELLATE COURT—Filed in the City Court of Granite City, Illinois, November 12, 1941

REVERSED ORDER

STATE OF ILLINOIS,
Appellate Court, Fourth District, ss.:

At an Appellate Court, begun and held at Mt. Vernon, on the fourth Tuesday in the month of May, in the year of our Lord one thousand nine hundred and forty-one, the same being the 27th day of May, in the year of our Lord one thousand nine hundred and forty-one.

Present: Hon. Lawrence E. Stone, Presiding Justice, Hon. Ralph J. Dady, Justice, Hon. John T. Culbertson, Jr., Justice, and David F. Mallett, Clerk:

And afterwards, to wit, on the 3rd day of October, in the year of our Lord one thousand nine hundred and forty-one, an order was made by said Court in words and figures following, to wit:

[fol. 20] No. 10. FEBRUARY TERM, 1940.

VICTOR J. HERB, Plaintiff-Appellant,

v.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for the Wabash Railway Co., a Corp., Defendants-Appellees.

Appeal from City Court of Granite City, Madison County.

On this day come again the said parties, and the Court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error in this: The trial court erred as set forth in the opinion of this Court filed herein on the 30th day of October, 1940, and this Court erred as set forth in the opinion filed by the Supreme Court in this Office on October 3, 1941.

Therefore, it is considered by the Court that, for such error, and others, in the proceedings aforesaid, the judg-

ment of the City Court entered non obstante veredicto be reversed, annulled, set aside and wholly for nothing esteemed, and that the motions heretofore made to reverse the judgment entered non obstante veredicto, and remand said cause for further proceedings in accordance with the opinions of this Court and the Supreme Court, be and the same are allowed, and the motions heretofore made to affirm the judgment and for procedendo be denied, and that this cause be remanded to the City Court of Granite [fol. 21] City with directions for further proceedings in accordance with the views expressed in the above-mentioned opinions hereto attached. And it is further considered by the Court that the said appellant recover of and from the said appellees cost by him in this behalf expended, and that appellant have execution therefor.

I, David F. Mallett, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of said Appellate Court in the above-entitled cause of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Court at Mt. Vernon, this 1st day of November in the year of our Lord one thousand nine hundred and forty-one.

David F. Mallett, Clerk of the Appellate Court.
(Seal.)

Defendants' motion to dismiss, filed in the City Court of Granite City, Illinois, November 25, 1941.

NOTICE OF FILING OF MANDATE, ETC.—Filed in the City Court of Granite City, Illinois, November 25, 1941

To the Above-Named Defendants or Warnock, Williamson & Burroughs, Their Attorneys:

You Are Hereby Notified that on the 12th day of November, 1941, the undersigned filed in the office of the Clerk of the City Court of Granite City the mandate, and transcript of the order, of the Appellate Court, which reversed the judgment entered for the defendants non obstante vere- [fol. 22] dicto by the said City Court of Granite City in the above-entitled cause.

You Are Further Notified that on the 25th day of November, 1941, at 2 o'clock p. m., or as soon thereafter as counsel may be heard, the undersigned will appear before the Honorable Wesley Lueders, Judge of said City Court of Granite City, in the room usually occupied by him as a court room or before any other judge who may be sitting in his stead, and shall then and there file and present:

1. A motion that the above-entitled cause be redocketed; and

2. A motion for judgment upon the verdict in the above-entitled cause, at which time you may appear if you see fit.

Copies of said motions are hereto attached.

Dated this 12th day of November, 1941.

Victor J. Herb, Plaintiff, by Mark D. Eagleton, McGlynn & McGlynn, His Attorneys.

Receipt of a copy of the above and foregoing notice, together with copies of the motions therein referred to thereto attached, is hereby acknowledged this 12th day of November, 1941.

Warnock, Williamson & Burroughs, Attorneys for Defendants.

[fol. 23] Motion to Redocket—Filed in the City Court of Granite City, Illinois, November 25, 1941

Now comes Victor J. Herb, plaintiff in the above entitled cause, by his counsel, and shows to the Court that:

1. On the 12th day of November, 1941, the plaintiff filed in the office of the clerk of this court the mandate, and transcript of the order, of the Appellate Court, which reversed the judgment entered for the defendants non obstante veredicto by this Court in the above-entitled cause.

2. On the 12th day of November, 1941, plaintiff gave to the above-named defendants, through their counsel, ten days statutory notice required to be given to the adverse party or parties in order to reinstate a case remanded from a court of review.

Wherefore, plaintiff moved the Court to make and enter an order herein redocketing the above-entitled cause, pursuant to the statutes in such cases made and provided.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff.

ORDER TO REDOCKET—Filed in the City Court of Granite City, Illinois, November 25, 1941

It appearing that the mandate, and a transcript of the order, of the Appellate Court reversing the judgment entered for defendants non obstante veredicto by the City [fol. 24] Court of Granite City, in the above-entitled cause, has been filed in the office of the clerk of this court, and it appearing that ten (10) days statutory notice required to be given to the adverse party or parties in order to reinstate a case remanded from a court of review has been given to defendants, and all of the parties being present in open court by their counsel, on motion of the plaintiff, by his counsel, it is ordered that this cause be, and the same is, hereby redocketed.

Dated this 25 day of November, 1941.

Wm. P. Boynton, Presiding Judge.

PLAINTIFF'S MOTION FOR CHANGE OF VENUE—Filed in the City Court of Granite City, Illinois, June 17, 1942

Comes now Victor J. Herb, plaintiff in the above-entitled cause, by Mark D. Eagleton and McGlynn & McGlynn, his attorneys, and states to and shows the Court that:

1. This suit or action was commenced in this court on or about the 22nd day of December, 1937;

2. As appears from the pleadings heretofore filed in this court in this cause, plaintiff's cause of action against defendants, which is involved in this suit or action, is a transitory cause of action which arose in or near the City of Decatur, State of Illinois.

3. The Supreme Court of Illinois, in the case of Paul W. Werner, Appellee, v. Illinois Central Railroad Company, [fol. 25] Appellant, No. 26,293, in said Supreme Court of

Illinois, decided March 16, 1942, rehearing denied June 9, 1942, and not yet reported, has ruled that each of the various City Courts in the State of Illinois is without jurisdiction to hear and determine any suit or action involving a cause of action which arose outside the city where said court is located; and

4. By reason of the premises, this suit or action has been commenced, and is pending, in the wrong court, and the venue thereof should be changed to a proper court pursuant to the terms and provisions of Chap. 146, Par. 36, Illinois Revised Statutes 1941.

Plaintiff further states that he is ready, willing and able, and hereby offers, to pay any and all costs required of him by the terms and provisions of said Chap. 146, Par. 36, Illinois Revised Statutes 1941.

Wherefore, plaintiff moves this Court, pursuant to the terms and provisions of said Chap. 146, Par. 36, Illinois Revised Statutes 1941, to change the venue of this suit or action to a proper court, to wit, the Circuit Court of Madison County, State of Illinois.

Mark D. Eagleton, McGlynn & McGlynn, Attorneys for Plaintiff Victor J. Herb.

Receipt of a copy of the above and foregoing motion is hereby acknowledged this 17th day of June, 1942.

Warnock, Williamson & Burroughs, Attorneys for Defendants.

[fol. 26] DEFENDANTS' MOTION TO DISMISS—Filed in the Circuit Court of Madison County, Illinois, August 21, 1942

Now come Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers for the Wabash Railway Company, a corporation, defendants in the above-entitled cause, by Warnock, Williamson & Burroughs, their attorneys, and, limiting their appearance herein for the sole and only purpose of this motion, move the Court to dismiss this cause and in support of this motion show to the Court the following, to wit:

1. That, as appears from the transcript of the record and proceedings and the files in this cause, plaintiff's complaint

and alleged cause of action was filed and instituted in the City Court of the City of Granite City in Madison County, Illinois, on, to wit, the 22nd day of December, A. D. 1937, in which said court the said cause remained, except such time as the same was pending on appeal in the Appellate and Supreme Courts of Illinois, and various and sundry proceedings were had therein, until on, to wit, the 17th day of July, A. D. 1942, when, on motion of plaintiff, the City Court of Granite City attempted to change the venue of this cause to this court, by entering an order of that date directing the Clerk of said City Court to transmit a transcript of the record and proceedings in said City Court in said cause, together with all orders, pleadings and files to the clerk of this court; and that pursuant to such order of said City Court a transcript of the record and proceedings of said City Court, in said cause, and all the files therein, were on, to wit, the — day of July, A. D. 1942, filed in the office of the clerk of this court.

[fol. 27] 2. That it appears from the plaintiff's complaint so filed in said City Court of Granite City, Illinois, that plaintiff's alleged cause of action is a civil action at law brought under the Federal Employers' Liability Act to recover damages for personal injuries suffered and sustained by the plaintiff on, to wit, November 23, 1936, while an employee of the defendants; and it further appears from said complaint that plaintiff's injuries were suffered and sustained, and that all transactions involved in this cause and out of which said alleged cause of action arises occurred at Decatur in Macon County, Illinois, and not within the territorial limits of the City of Granite City, in Madison County, Illinois.

3. That under and by virtue of Section 1 of Article VI of the Constitution of 1870 of the State of Illinois, the General Assembly of the State of Illinois is limited, so far as the creation of courts for cities is concerned, to courts in and for such cities, having jurisdiction only of the subject matter of causes of action arising within the territorial limits of such cities; that the City Court of Granite City, Illinois, was established and now exists under the provisions of said Section 1 of Article VI of the Constitution of 1870 of the State of Illinois and the Statutes of the State of Illinois enacted pursuant thereto, to wit, an act entitled "An Act in

Relation to Courts of Record in Cities," approved March 26, 1874, and in force July 1, 1874 (Ill. Rev. Stat., 1874, Ch. 37, Pars. 191 to 212 inclusive), and amendments thereto; that by reason of said constitutional provisions and the terms and provisions of the Statute of the State of Illinois under and by virtue of which the said City Court of Granite City was [fol. 28] established and now exists, the jurisdiction of said City Court is limited to the territorial limits of said City of Granite City in all civil cases, both law and chancery, arising within the corporate limits of said city, and that said City Court has no jurisdiction whatsoever under said statute and the Constitution of the State of Illinois to hear and determine causes of action arising outside of the territorial limits of said city.

4. That said City Court of Granite City, Illinois, was at all times heretofore without jurisdiction to try and determine or to adjudicate said suit or alleged cause of action or to enter any order therein; that said suit or alleged cause of action was improperly filed and instituted in said City Court, and that all orders heretofore entered in said cause and all proceedings had therein by the said City Court of Granite City, Illinois, are null and void and of no effect.

5. The said City Court of Granite City, Illinois, being without jurisdiction to try this cause or to enter any valid order therein, the said order of said City Court entered on July 17, 1942, attempting to change the venue of this cause and ordering the same to be transferred from said City Court to the Circuit Court of Madison County, Illinois, is invalid and of no force and effect and was improperly entered, and that this cause is improperly upon the docket of this court.

6. The Venue Act (Par. 36, Ch. 146, Ill. Rev. Stat. 1941), if it purports, as is claimed, to authorize a City Court to change the venue or to transfer a cause of action in which it has no jurisdiction of the subject matter to another court having jurisdiction, is at variance with and contrary to [fol. 29] Section 1, Article VI, of the Constitution of the State of Illinois and to the statutes under which City Courts are established, and is therefore null and void.

7. The Venue Act (Ch. 146, Par. 36, Ill. Rev. Stat. 1941), if it purports, as is claimed, to authorize the City Court of Granite City to transfer to another court a cause of action

arising under the Federal Employers' Liability Act, but not within the corporate limits of the City of Granite City, is at variance with Section 6 of said Federal Act (Sec. 56, Tit. 45, U. S. Code, Annot.), since that act refers only to actions brought "in any state court of competent jurisdiction," and any such attempt to change the venue is, therefore, null and void.

8. Plaintiff's injuries were sustained on the 23rd day of November, A. D. 1936, and his cause of action, if any, accrued on that date. Plaintiff did not commence this suit in a court having jurisdiction of the subject matter or any court of competent jurisdiction within two (2) years from the date he sustained and received his injuries.

9. Plaintiff, by filing his complaint in the City Court of Granite City, did not "commence" his action within the meaning of Section 6 of the Federal Employers' Liability Act (Sec. 56, Tit. 45, U. S. C. A., 1941, Ann., Pocket Part).

10. The order of said City Court attempting to change the venue of this cause to this court was improper, and the transcript of the record and proceedings of said City Court in said cause, with the files therein, were improperly transferred to and filed in the office of the clerk of this court; [fol. 30] and this Court is without jurisdiction to hear and determine this cause, or to enter any order therein except an order of dismissal as prayed herein.

Wherefore, defendants pray that this cause be dismissed.
Warnock, Williamson & Burroughs, Bank of Edwardsville Building, Edwardsville, Illinois, Attorneys for Defendants.

Adjourning order of the Circuit Court of Madison County, Illinois, October 16, 1942.

Convening order of the Circuit Court of Madison County, Illinois, October 19, 1942.

IN THE CIRCUIT COURT OF MADISON COUNTY, ILLINOIS

4290 Law

VICTOR J. HERB

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers for Wabash Railway Company, a Corporation

ORDER SUSTAINING DEFENDANTS' MOTION TO DISMISS, AND ENTERING JUDGMENT OF DISMISSAL—Entered November 27, 1942

And now on this day motion to dismiss sustained. Therefore it is considered and adjudged by the Court that the [fol. 31] plaintiff take nothing by his suit, and that the defendant go hence without day, and that the defendants have and recover of and from plaintiff their costs and charges in this behalf expended and have execution therefor.

Adjournment order of the Circuit Court of Madison County, Illinois, January 8, 1943.

Convening order of the Circuit Court of Madison County, Illinois, January 11, 1943.

CERTIFICATE OF TRIAL JUDGE—Filed in the Circuit Court of Madison County, Illinois, February 23, 1943

I, Dick H. Mudge, Judge of the Circuit Court of Madison County, State of Illinois, before whom and by whom the above-entitled cause was heard and final order and judgment of dismissal therein entered at the request of counsel for plaintiff, do hereby certify that there is involved in said case, and in said final order and judgment, a construction of the Constitution of the State of Illinois and of the United States and the validity of a statute, to wit, Section 36 of Chapter 146, Revised Statutes of Illinois 1941, also the validity, construction and application of a federal statute, to wit, Section 6 of the Federal Employers' Liability Act, as amended (Section 56, Title 45, U. S. C. A., 1941, Ann., Pocket Part).

I further certify that, in my opinion, the public interest requires that the appeal herein shall be taken directly to the Supreme Court of Illinois.

Dated this 12th day of February, 1943.

D. H. Mudge, Judge of the Circuit Court of Madison County, Illinois.

[fol. 32] NOTICE OF APPEAL

Plaintiff-appellant's notice of appeal to the Supreme Court of Illinois from the Circuit Court of Madison County, Illinois, filed February 23, 1943, appealing from the whole of the order and final judgment entered in this cause on the 27th day of November, 1942, sustaining defendants-appellees' motion to dismiss and dismissing plaintiff-appellant's action and cause at his cost, and asking by way of relief that said order and judgment be reversed and the cause remanded to said Circuit Court of Madison County, Illinois, with directions to reinstate plaintiff-appellant's cause upon the docket of said Circuit Court for further proceedings therein, to set aside and vacate said order, ruling and judgment sustaining defendants-appellees' motion to dismiss and dismissing plaintiff-appellant's cause, and to overrule defendants-appellees' motion to dismiss, with the certificate of the clerk as to the filing of said notice of appeal, together with proof of service of a copy of said notice of appeal on opposite counsel on February 23, 1943.

Praecipe for record, with proof of service of copy thereof on opposing counsel, filed February 23, 1943.

Adjournment order of the Circuit Court of Madison County, Illinois, March 12, 1943.

Convening order of the Circuit Court of Madison County, Illinois, March 15, 1943.

Certificate of the Clerk of the Circuit Court of Madison County, Illinois, to the transcript of record, dated March 23, 1943.

[fol. 33] The above and foregoing is respectfully submitted as and for plaintiff-appellant's abstract of record herein.

McGlynn & McGlynn, 120 North Main Street, East St. Louis, Illinois; Mark D. Eagleton, 3746 Grandel Square, St. Louis, Missouri; Roberts P. Elam, 706 Chestnut Street, St. Louis, Missouri, Attorneys for Plaintiff-Appellant.

[fol. 3] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of May in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal. Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 20th day of May, A. D. 1943, the same being one of the days of the term of Court aforesaid, an order of submission was entered by the Supreme Court of Illinois in the same case, which order of submission is in the words and figures following, to-wit:

[fol. 4] No. 27275

VICTOR J. HERB, Appellant

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., Receiver for Wabash Railway Company, a corporation, Appellees.

Appeal, Circuit Court, Madison County

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellees having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been

argued orally by Roberts P. Elam for appellant and George D. Burroughs for appellees is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 5] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warrent C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit: on the 24th day of September, A. D. 1943, the same being one of the days of the term of Court aforesaid, an opinion was filed by the Supreme Court of Illinois in the office of the clerk of the Supreme Court of Illinois, in the same case, which opinion is in the words and figures following, to-wit:

[fol. 6] Docket No. 27275—Agenda 40—May, 1943

VICTOR J. HERB, Appellant,

v.

NORMAN B. PITCAIRN et al., Receivers for WABASH RAILWAY COMPANY, Appellees

MR. JUSTICE GUNN delivered the opinion of the court:

The appeal in this case is taken by the plaintiff, Victor J. Herb, from the judgment of the circuit court of Madison county sustaining the defendants' motion to dismiss, and entering final judgment of dismissal in favor of defendants-appellees. Among the grounds urged before the circuit court as a basis for such dismissal was the unconstitution-

ality of a statute, as shown by the certificate of the trial judge, which would give us jurisdiction of the direct appeal, whether or not the case was decided upon that point. *Groome* v. *Freyn Engineering Co.* 374 Ill. 113.

The facts in the case are substantially as follows: The plaintiff was an employee of the receivers of the Wabash Railway Company, and December 22, 1937, commenced an action in the city court of Granite City, Illinois, against the defendants stating a cause of action under the Federal Employers' Liability Act for injuries claimed to have been sustained in the city of Decatur, Illinois, November 23, 1936. The defendants answered denying the allegations of the complaint and setting up other defenses. The cause was tried in the city court in October, 1938, and resulted in a verdict in favor of the plaintiff, which was set aside upon a motion by the defendants for judgment notwithstanding the verdict.

The plaintiff appealed to the Appellate Court, where the cause was reversed and remanded, which action was affirmed by this court in *Herb* v. *Pitcairn*, 377 Ill. 405. After the cause had been redocketed, but before it was tried, the cases of *Werner* v. *Illinois Central Railroad Co.* 379 Ill. 559, and *Mitchell* v. *Louisville and Nashville Railroad Co.* 379 Ill. 522, were decided by this court, in which it was held and determined the city courts in Illinois were without jurisdiction to hear and determine the subject matter of any action, the cause of which arose outside of the territorial limits of the city court in which the action was pending. After learning of these decisions the plaintiff filed a motion in the city court of Granite City for a change of venue to the circuit court of Madison county, under the provisions of the statute purporting to authorize a change of venue of a suit commenced in the wrong court or county to the proper [fol. 7] court or county, as in cases of change of venue. (Ill. Rev. Stat. 1941, chap. 146, par. 36.) The motion for change of venue was allowed by the city court and the venue ordered changed to the circuit court of Madison county, and on July 31, 1942, all of the pleadings and papers, and a certified transcript of all orders in said cause in the city court of Granite City were duly filed in the circuit court of Madison county, as on change of venue.

August 21, 1942, appellees filed in the circuit court of Madison county their motion to dismiss plaintiff's cause

for the following reasons: That since the city court of Granite City had no jurisdiction of the case because it appeared the cause of action accrued outside of the territorial limits of Granite City (1) all orders entered, and all proceedings had in the city court of Granite City, including the order changing the venue thereof, were void and of no effect; (2) that the statute authorizing a city court to change the venue of an action of which it has no jurisdiction to a court having jurisdiction is contrary to section 1 of article VI of the constitution, and therefore void; and (3) said cause having been transferred on change of venue on July 17, 1942, more than two years after the date of the injury, November 23, 1936, the plaintiff could not maintain his action because it had not been commenced within two years from the date of his injury in a court having jurisdiction to hear and determine the same.

The circuit court of Madison county sustained the motion of appellees to dismiss plaintiff's suit, and November 27, 1942, entered judgment that the plaintiff take nothing, and that the defendants recover costs. After the entry of judgment the judge of the circuit court signed a certificate that there was involved in the said final order and judgment the construction of the constitutions of the State of Illinois and of the United States, and the validity of a statute, (Ill. Rev. Stat. 1941, chap. 146, par. 36,) and also the validity, construction and application of a Federal statute, viz., section 6 of the Federal Employers' Liability Act as amended. Section 56, Title 45, U. S. C. A. 1941.

The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act, by transferring the cause from a court having no jurisdiction over it at a date which, if then [fol. 8] originally filed in the latter court, could not be maintained because not filed within the statutory time. The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment, because if the judgment to be rendered would be void it necessarily follows the preliminary proceedings of the court, necessary to rendition of judgment, must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings. If judgment had been entered in

the city court it would have been absolutely void. (*Werner* v. *Illinois Central Railroad Co.* 379 Ill. 559; *Mitchell* v. *Louisville and Nashville Railroad Co.* 379 Ill. 522.) The act of a tribunal beyond its jurisdiction is null and void whether without its territorial jurisdiction or beyond its powers. (*Welton* v. *Hamilton,* 344 Ill. 82.) A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, conferring no right and affording no justification. (*Voorhees* v. *Bank of the United States,* 10 Pet. 475, 9 L. ed. 501.) Nothing can be acquired or lost by it; it neither bestows nor extinguishes any right. (*Johnson* v. *Carroll,* 190 Ky. 689, 228 S. W. 412; *Abernathy* v. *Missouri Pacific Railway Co.* 287 Mo. 30, 228 S. W. 486.) It can be attacked at any time, even in the first instant on appeal. (*Campbell* v. *Porter,* 162 U. S. 478, 40 L. ed. 1944; *Perez* v. *Fernandez,* 202 U. S. 80, 50 L. ed. 942.) And it may not be validated either by waiver or consent. (*Windsor* v. *McVeigh,* 93 U. S. 274, 23 L. ed. 914.) Where there is a want of authority over the subject matter the judgment is open to successful impeachment, if such fact is made to appear from the face of the record or by matters *dehors,* where extraneous evidence is receivable for the purpose. *Armstrong* v. *Obucino,* 300 Ill. 140; *Rabbitt* v. *Weber & Co.* 297 Ill. 491.

It is the element of jurisdiction that differentiates a void from a voidable judgment; both the subject matter and the parties must be before the court, and jurisdiction of the one without the other will not suffice; the two must concur or the judgment will be void in any case in which the court assumes to act. (*Rabbitt* v. *Weber & Co.* 297 Ill. 491.) And we have further held that even a court of general jurisdiction has no power to do any act or render any judgment affecting persons or property, unless the [fol. 9] particular act or judgment is brought within its jurisdiction according to law. (*People ex rel. Brundage* v. *Righeimer,* 298 Ill. 611.) These are general principles upon which substantially all courts are in agreement.

Applying now these principles to the facts before us we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) commencing such action in a court having jurisdiction to hear and determine the same. It has been held by the Fed-

eral authorities that section 6 of the Federal Employers' Liability Act is not a statute of limitations pertaining to the remedy, but is a condition of liability constituting a substantial part of the right created. (*Central Vermont Railway Co.* v. *White,* 238 U. S. 507, 59 L. ed. 1433; *Phillips* v. *Grand Trunk Railway Co.* 236 U. S. 662, 59 L. ed 774; *Bell* v. *Wabash Railway Co.* 58 Fed. (2) 569; *Atlantic Coast Line Railway Co.* v. *Burnette,* 239 U. S. 199, 60 L. ed. 226.) The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit and of bringing it in a court having jurisdiction to hear and determine it.

While the appellant does not precisely so state, apparently it is his contention that, having begun the suit in a court without jurisdiction of the subject matter but having changed the venue thereof and transferred it to one that would have jurisdiction, the date of the transfer to the latter court would relate back to the time of filing it in the court not having jurisdiction, thus giving the order changing the venue the effect of having a case continuously pending in the court of proper jurisdiction from the time the action was commenced in the one not having it. The fallacy of this argument rests in the fact that it becomes necessary to give validity to proceedings in a court, the judgment of which, if rendered upon such proceedings, would be wholly void. If the ultimate object to be obtained in a suit at law, viz., a judgment, is utterly void, it is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory orders and the like have any effect, when the result, had such proceeding been concluded in the first court, would have been a nullity.

A case in point is illustrated by the facts in *Crowley* v. *Southern Railway Co.* 139 Fed. 851. The Alabama legislature had attempted to create a circuit court with different [fol. 10] divisions, but the act creating it was held unconstitutional in *Ex rel. Birmingham and Alanta Railway Co.* 42 So. 118. In the *Crowley* case the cause of action was claimed to be saved because a summons had been issued out of such illegal division of the circuit court, but in commenting upon the effect of this summons the court said: "The act constituting the southern division of the circuit court of St. Clair county at Pell City being unconstitutional, there was no authority for filing the summons and com-

plaint with Smith or anybody else at Pell City. The issue of the summons to appear before a court or at a time not authorized by law was a nullity, and so was the service of the summons. What was done in this matter at Pell City was as ineffectual to constitute a 'suit' in the real circuit court of St. Clair county as if the plaintiff had filed the summons and complaint with some merchant at Pell City and procured him to hand them to the defendants." In substance the same has been held in *Inter-Southern Life Insurance Co.* v. *Pierce,* 31 S. W. (2) 692; *Willing* v. *Provident Trust Co.* 21 Fed Supp. 237; *Manning* v. *Ketchem,* 58 Fed. (2) 948, and stated in the text of Cor. Jur. Sec. Vol. 21, pages 177 and 178. And in *Vincent* v. *McElvain,* 304 Ill. 160, at 163, it is said a suit or action is commenced when the party puts in motion, under his claim, the instruments of a court of general jurisdiction.

When the present suit was filed in the city court of Granite City the defendants could have disregarded the summons, and judgment rendered in such court would have been without effect and no justification for seizing defendants' property on execution. Yet, if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order of transfer by the city court the effect of vitalizing process that was void and considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judicial control of defendants had yet been exercised.

Conceding, but not deciding, that in proper cases a court without jurisdiction of the subject matter could by statute be authorized to transfer its proceedings to a court having jurisdiction, still the condition that the action be commenced within two years is not met. A like situation has been [fol. 11] presented under statutes extending time for bringing suit where an action has been commenced but the plaintiff nonsuited, as illustrated by section 24 of the Limitations Act. (Ill. Rev. Stat. 1941, chap. 83, par. 24a.) Under the conditions present in this case it has been held such statutes cannot recreate a right given under a Federal statute that has ceased to exist by the terms of the (Federal) statute. (*Bell* v. *Wabash Railway Co.* 58 Fed. (2) 571; *Denny & Co.* v. *Southern Pacific Co.* 263 Ill. App. 106; *Sweet* v. *Chattanooga Elec Lt. Co.* (Tenn.) 36 S. W. 1090; *Gulf, O. & F. S.*

Railway Co. v. *Gordon,* 218 S. W. (Texas) 74; *Fidelity Trust Co.* v. *Gill Car Co.* 25 Fed. 737.) In the last case the language used covers precisely the present situation when it is said: "Not only must there be a controversy, but as well always a form of procedure of some kind, possessing all the necessary elements of a 'suit' or 'case' in court, the most important of which is, no doubt, that there shall be a tribunal authorized to issue that indispensable notice which we call a writ of process, to bring the parties together in court; and this must be not only sufficient in form and in fact, but in legal and technical effect, to constitute a 'suit' or 'case' which can only be when the tribunal undertaking the initiatory steps is duly authorized to do that thing and to proceed with the matter of adjudging between the parties.* * * There must be *ex necessitate rei,* a court having power to set in motion the machinery of the law, and this we call its jurisdiction over the subject matter."

Appellant calls our attention to *Central Illinois Public Service Co.* v. *Industrial Com.* 293 Ill. 62, as supporting his claim that the want of jurisdiction of the Granite City city court did not prevent its properly being in the circuit court of Madison county for all purposes. In that case we held the venue statute in Illinois, as applying to a circuit court having no jurisdiction over the subject matter, has no other purpose than to authorize a transfer to another circuit court which had, but does not affect any of the other rights of the parties. This case was so interpreted in *Gill* v. *Lynch,* 367 Ill. 203. In the case last cited a receiver had been appointed in the county court under the so-called Skarda Act. (Laws of 1933, p. 874.) The act was later held unconstitutional. A petition was then filed to transfer the venue of the case to the circuit court. The question arose as to the effect of the appointment of the receiver in the county court after the case had been transferred to the circuit court. The question [fol. 12] presented for decision was set out as follows: "The question in the case is whether or not the appointment of a receiver for real estate by a county court having no jurisdiction of the subject matter, is validated by a subsequent transfer of the cause to the proper court, under the provisions of the statutes relating to venue." The circuit court held the plaintiff, county treasurer, could not recover anything held by his predecessor in office as re-

ceiver under appointment by the county court because the proceeding was absolutely void. In affirming that decision we held that the appointment of a receiver in the county court and all subsequent orders, except the one transferring the cause, were void. And among other things we said: "The effect of proceedings in courts having jurisdiction of the subject matter is not material here. Principles applicable to such cases have no bearing where the court has no jurisdiction to entertain the cause. It is a cardinal principle of the law that void proceedings are without any force or effect, and are always subject to attack, either directly or collaterally. Neither section 16, nor the act of 1891, contains any provision that, by the most liberal interpretation, can be construed as validating void judgments or proceedings." The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, if the cause is filed in a court which could never lawfully acquire jurisdiction, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court. We think the interpretation of the venue statute in the *Gill* case conclusively is against appellant.

It is clear a suit was not commenced by filing the present suit in the city court of Granite City, or by issuing summons or filing a complaint. Lacking requisite jurisdiction because of the provisions of the constitution limiting it to cases arising within the limits of the city, such court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment. When the case was transferred to the circuit court of Madison county, some five years after the date of the accident, by the filing of the transcript of orders entered in the city court, and the pleadings and other documents, there was no commencement of a suit, but only the receipt of papers from a court in which it was im- [fol. 13] possible to commence one because of its lack of jurisdiction. To hold the suit was started in the circuit court at the time when it was attempted to be commenced in the city court is not only to decide something which is obviously not the fact, but also to give effect to the proceedings in another court, which up to that time must be considered as a nullity. To so hold would in effect revive a

cause of action already barred by limitations and deprive the defendant of a vested right. Cooley's Constitutional Limitations, p. 448.

In this case jurisdiction of the suit was wholly lacking until July 31, 1942 (if we consider the change-of-venue act valid), and at this time the condition imposed upon the plaintiff with respect to bringing his suit had expired by lapse of time. This determination makes it unnecessary to pass upon either the constitutional question involved or the validity of the change-of-venue statute.

It is our conclusion the judgment of the circuit court of Madison county in dismissing the suit and entering judgment against the appellant was correct, and its judgment is accordingly affirmed.

Judgment affirmed.

[fol. 14] UNITED STATES OF AMERICA

STATE OF ILLINOIS
Supreme Court, ss:

At a Supreme Court, begun and held in Springfield, on Monday, the 13th day of September in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice, Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson, George F. Barrett, Attorney General; Warren C. Murray, Marshal. Attest: Edward F. Cullinane, Clerk pro tempore.

Be It Remembered, that, to-wit: on the 24th day of September A. D. 1943 the same being one of the days of the said term of said Supreme Court, certain proceedings were had in said court and entered of record in the words and figures following, to-wit:

No. 27275

VICTOR J. HERB, Appellant,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, Jr., Receiver for Wasbash Railway Company, a Corporation, Appellees

Appeal from Circuit Court, Madison County. 4290

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the circuit court of Madison county aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellant Costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 24th day of September A. D. 1943.

Edward F. Cullinane, Clerk pro tempore, Supreme Court of the State of Illinois. (Seal.)

[fol. 15] And afterwards, to-wit: on the 19th day of October, A. D. 1943, the same being one of the days in vacation after the term of Court aforesaid, there was filed by appellant in the office of the Clerk of the Supreme Court of Illinois in the same case, a petition for rehearing, which petition is in the words and figures following, to-wit:

[fols. 45-47] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

APPELLANT'S PETITION FOR REHEARING—Filed October 19, 1943

Comes now Victor J. Herb, by McGlynn & McGlynn, Mark D. Eagleton and Roberts P. Elam, his attorneys, and presents his petition for a rehearing of the above-entitled cause, and respectfully prays that a rehearing be granted in said cause on the grounds and for the reasons in the petition herewith presented.

McGlynn & McGlynn, Mark D. Eagleton, Roberts P. Elam, Attorneys for Appellant, Victor J. Herb.

[fol. 48] MAY IT PLEASE THE COURT:

I

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the point that, notwithstanding that the City Court of Granite City was without jurisdiction to hear and determine the merits of plaintiff-appellant's action against defendants-appellees, plaintiff's said action was "commenced" in that City Court within the two-year period prescribed by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. [1934 Edition], § 56), and that the City Court had a limited jurisdiction over that action, by virtue of the Illinois Revised Statutes 1941, chap. 146, par. 36, which authorized and empowered the City Court to change the venue of such action to the Circuit Court of Madison County which had jurisdiction to hear and determine the merits of plaintiff's case.

On page 1 of the printed opinion in this case, this Honorable Court fully recognized plaintiff's action against defendants was "commenced within two years from the day the cause of action accrued," as required by Section 6 of the Federal Employers' Liability Act, for this Court there said:

> "The facts in the case are substantially as follows: The plaintiff was an employee of the receivers of the Wabash Railway Company, and December 22, 1937,

> **commenced an action** in the city court of Granite City, Illinois, against the defendants stating a cause of action under the Federal Employers' Liability Act for injuries claimed to have been sustained in the city of Decatur, Illinois, November 23, 1936." (Emphasis ours.)

[fol. 49] However, this Court overlooked, misconceived or misapprehended the requirements of that section of the Federal Act, for on pages 2 and 3 of the printed opinion of this case it said:

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury **in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act**, by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time." (Emphasis ours),

and again, on page 4 of the printed opinion it further said:

> "Applying now these principles to the facts before us we observe recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) **commencing such action in a court having jurisdiction to hear and determine the same.** • • • The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit **and of bringing it in a court having jurisdiction to hear and determine it.**" (Emphasis ours.)

We respectfully submit that Section 6 of the Federal Employers' Liability Act does not necessarily require that actions thereunder must be "commenced" in a court having jurisdiction to hear and determine the merits of the action. [fol. 50] We recognize that a suit is not "commenced" until a proceeding is instituted in a court which has acquired jurisdiction of something in relation to the controversy.

We submit that, in the instant case, the City Court of Granite City had acquired jurisdiction over the person of plaintiff when he applied for its power and assistance in connection with his rights under the law, and that it then had—by virtue of Illinois Revised Statutes 1941, chap. 146, par. 36—a limited jurisdiction to transfer plaintiff's action, by change of venue, to a "proper court" having jurisdiction to hear and determine the merits of that action. This transfer by change of venue, as pointed out at page 24 of appellant's original brief herein and again at page 6 of appellant's reply brief herein, did not constitute the dismissal of plaintiff's suit in the City Court and the commencement of a new suit in the Circuit Court, but constituted merely one of the steps or proceedings in the prosecution of the suit commenced in the City Court and ultimately to be determined on its merits in and by the Circuit Court. It thus appears that when plaintiff commenced his action in the City Court of Granite City, within two years from the date his cause of action accrued, he fully complied with the requirements of Section 6 of the Federal Employers' Liability Act, which, in so far as is here material, provided:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued. * * * The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, * * *."

[fol. 51]

II

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the opinion and decision of this Court in Central Illinois Public Service Co. v. Industrial Commission, 293 Ill. 62, 127 N. E. 80, and the effect of that decision upon the case at bar.

(A)

On page 6 of the printed opinion, with reference to that decision, this Court has said:

> "In that case we held the venue statute in Illinois, as applying to a circuit court having no jurisdiction over the subject matter, has no other purpose than to authorize a transfer to another circuit court which had,

but does not affect any of the other rights of the parties."

and on page 7 of the printed opinion, this Court in that connection further said:

"The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, **if the cause is filed in a court which could never lawfully acquire jurisdiction**, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court." (Emphasis ours.)

In making this last statement, we respectfully submit, this Honorable Court has overlooked that, under the facts in the Central Illinois Public Service Co. case, supra, the Circuit Court of Coles County "could never lawfully ac- [fol. 52] quire jurisdiction" to hear and determine the merits of, or over the person of the administrator party in, the suit there commenced in that court. This Court, nevertheless, there ruled that the Circuit Court of Coles County, by virtue of what is now Illinois Revised Statutes 1941, chap. 146, par. 36, was vested with a limited jurisdiction which empowered that Court to change the venue of that suit to the Circuit Court of Champaign County, which was a "proper court" having jurisdiction of the subject matter of the suit and the means of acquiring jurisdiction over the person of the administrator involved therein. This Court, with reference to the effect of the act which is now Illinois Revised Statutes 1941, chap. 146, par. 36, there specifically ruled that (293 Ill., l. c. 69):

"By this act it is evident that **the legislature intended to and did confer on all courts of record in this State, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, jurisdiction to 'change the venue of such suit or proceeding to the proper court or county.'** It cannot be doubted that the power to confer that **limited jurisdiction** lies within the powers of the legislature, and * * * while the circuit court of Coles County had no jurisdiction of the subject matter involved for any other purpose than that defined in the Venue Act of

1891 [now Illinois Revised Statutes 1941, ch. 146, par. 36], and could therefore enter no order affecting the rights of the parties * * * that court was by said act empowered to transfer the cause to the proper county * * *, and under said act when said transfer was made the cause was from that time forward pending in the circuit court of Champaign County." (Emphasis and bracketed portion supplied.)

[fol. 53] The ruling in the Central Illinois Public Service Co. case, supra, to the effect that the Venue Act conferred on all courts of record in Illinois, without regard to any other jurisdiction either conferred upon or denied them, a "limited jurisdiction" to change the venue of any suit or proceeding improvidently brought in any such court to the proper court or county, was not in the slightest degree weakened, criticised or modified by the ruling in the case of Gill v. Lynch, 367 Ill. 203, 10 N. E. (2d) 812. On the contrary, the decision in Gill v. Lynch, supra, reaffirms the doctrine of the Central Illinois Public Service Co. case, for it holds that the transfer of the cause in the Gill case from the County Court to the Circuit Court, upon change of venue under the Venue Act, was valid, and ruled void only the orders appointing receivers, saying (10 N. E. [2d] 814):

"These holdings conclusively demonstrate that the county court had no jurisdiction to hear a petition for appointment of a receiver or for any other purpose **except to transfer the cause to the proper court.** The appointments, and all subsequent orders, **except that transferring the cause,** being void, the cause therefore went to the circuit court **with the petitions for appointment of a receiver still pending and undetermined.**" (Emphasis ours.)

(B)

Furthermore, it should be noted that in the Central Illinois Public Service Co. case, supra, there was involved the question of whether, as the statute required, the suit there had been by writ of certiorari "commenced within twenty [fol. 54] days of the receipt of notice of the decision of the board." The opinion discloses that the decision of the Board had been rendered on August 10, 1918; that the praecipe for writ of certiorari had been filed on August 26, 1918, in the Circuit Court of Coles County—which Court,

the opinion rules, was without jurisdiction of the subject matter of the suit or of the administrator party; that the change of venue under the Venue Act was not applied for until May 3, 1919—many months after the decision of the Board; and that thereafter the change of venue was granted, and the transcript on change of venue filed in the Circuit Court of Champaign County. This Court there held that the suit was "commenced" within twenty days after the decision of the Board, *and when the proceeding was instituted by the filing of the praecipe for writ of certiorari in the Circuit Court of Coles County (which had no jurisdiction to hear and determine the merits of the suit)*, notwithstanding that the change of venue to the Circuit Court of Champaign County (which had jurisdiction to hear and determine the merits of the suit) did not take place until some months thereafter. It necessarily follows from that decision that it should be ruled in the case at bar that plaintiff's suit was "commenced within two years from the day the cause of action accrued" and when the proceedings were instituted in the City Court of Granite City, rather than when the change of venue to the Circuit Court of Madison County took place under the provisions of the Venue Act.

[fol. 55] III

This Honorable Court, in rendering its opinion and decision in this case, has overlooked, misconceived or misapprehended the effect of sustaining the plaintiff's position in this case.

On page 5 of the printed opinion in this case the Court has said:

> "When the present suit was filed in the city court of Granite City the defendants could have disregarded the summons, and judgment rendered in such court would have been without effect and no justification for seizing defendants' property on execution. Yet, if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order of transfer by the city court the effect of vitalizing process that was void and considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judi-

cial control of defendants had yet been exercised." (Emphasis ours.)

This quotation indicates that this Honorable Court conceives it to be necessary to the "commencement" and "pendency" of a suit that the Court in which the proceeding was instituted should have jurisdiction over the person of the defendant. Ordinarily, and in the absence of statutory restrictions, whether a suit is "commenced" or "pending" does not depend upon service of process upon the defendant, or the existence of jurisdiction over him (see 1 Corpus Juris Secundum, pp. 1396-1397, § 129), and in [fol. 56] Illinois the only requirement for the commencement of an action or suit is the filing of the complaint (see Illinois Revised Statutes 1941, chap. 110, par. 129). So, even if the summons issued out of the City Court in the case at bar could have been disregarded by defendants, and even if it should be necessary that a new summons or notice be issued out of the Circuit Court to which the venue had been changed, and served upon defendants, in order for plaintiff to secure the rendition of a valid judgment against defendants, the fact that such summons had not been issued and served would not alter the fact that plaintiff's suit had been "commenced" in the City Court, and thereafter remained "pending." That is to say, plaintiff's suit had been "commenced" within the time required by the Federal Act, and thereafter remained "pending," even though the City Court, and the Circuit Court to which the venue of the suit was changed under the Venue Act, had not acquired jurisdiction over the persons of the defendants.

In view of the fact that this Court has overlooked, misconceived or misapprehended the matters above pointed out, we urge that a rehearing should be granted, and that on such rehearing the judgment of the Circuit Court should be reversed, and this cause remanded for further proceedings.

Respectfully submitted, McGlynn & McGlynn, Mark D. Eagleton, Roberts P. Elam, Attorneys for Appellant.

[fol. 17] UNITED STATES OF AMERICA

STATE OF ILLINOIS
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice, Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal. Attest: Edward F. Cullinane, Clerk pro tempore.

Be It Remembered, that, to-wit: on the 12th day of November, A. D. 1943, the same being one of the days of the term of Court aforesaid, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 27275

VICTOR J. HERB, Appellant,

vs.

Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receiver for Wasbash Railway Company, a corporation, Appellees.

APPEAL, CIRCUIT COURT, MADISON COUNTY

ORDER

And now on this day, the Court having duly considered the petition for rehearing filed by appellant in the above entitled cause, and the Court being fully advised in the premises.

It Is Ordered that the petition for rehearing be, and the petition for rehearing is hereby denied.

[fol. 18] UNITED STATES OF AMERICA

STATE OF ILLINOIS
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and forty-three, within and for the State of Illinois.

Present: June C. Smith, Chief Justice, Justice Clyde E. Stone, Justice Walter T. Gunn, Justice William J. Fulton, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson, George F. Barrett, Attorney General, Warren C. Murray, Marshal. Attest: Edward F. Cullinane, Clerk pro tempore.

Be It Remembered, that, to-wit: on the 19th day of November, A. D. 1943, the same being one of the days of the term of Court aforesaid, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 27275

VICTOR J. HERB, Appellant,

vs.

Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receiver for Wasbash Railway Company, a corporation, Appellees.

APPEAL, CIRCUIT COURT, MADISON COUNTY

ORDER

Now on this day the Court having duly considered the motion by appellant to stay the mandate for a period of ninety days, and the Court being fully advised in the premises,

It Is Ordered that the mandate in the above entitled case be, and the mandate is hereby stayed for a period of ninety days.

[fol. 19] UNITED STATES OF AMERICA

STATE OF ILLINOIS
Supreme Court, ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of

1. abstract of record filed April 20, 1943
2. order of submission entered May 20, 1943
3. opinion filed September 24, 1943
4. mandate
5. petition for rehearing filed October 19, 1943
6. order denying petition for rehearing entered November 12, 1943.
7. order staying mandate for a period of ninety days entered November 19, 1943.

in a certain cause entitled in this Court

No. 27275

HERB, Appellant,

vs.

PITCAIRN, et al., etc., Appellees.

APPEAL, CIRCUIT COURT, MADISON COUNTY

Witness: my hand and seal of said Supreme Court, in Springfield, in said State, this first day of December A. D. 1943.

Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 60] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted, and the case is consolidated with No. 682 for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2522)